

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JAMES RUSSO,

Plaintiff,

- against -

97 Civ. 5469 (WHP)

MP222 LLC, 222 EAST 95<sup>th</sup> OWNERS CORP.,  
COMMISSIONER OF SOCIAL SERVICES OF  
THE CITY OF NEW YORK, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,  
NEW YORK CITY DEPARTMENT OF FINANCE,  
MERRILL LYNCH CREDIT CORPORATION  
and the INTERNAL REVENUE SERVICE OF  
THE UNITED STATES OF AMERICA,

Defendants.

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UNITED STATES OF AMERICA,

Counterclaim, Crossclaim  
and Third-Party Plaintiff,

- against -

JAMES RUSSO,

Counterclaim Defendant.

-and-

MP222 LLC, 222 EAST 95<sup>th</sup>  
OWNERS CORP., COMMISSIONER OF SOCIAL  
SERVICES OF THE CITY OF NEW YORK, NEW  
YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, NEW YORK CITY DEPARTMENT  
OF FINANCE, MERRILL LYNCH CREDIT  
CORPORATION,

Crossclaim Defendants,

and

JAMES A. RUSSO, JOHN DOES NOS. 1-10 and  
JANE DOES NOS. 1-10,

Third-Party Defendants.

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**NOTICE OF MOTION**  
**TO CONFIRM AND AMEND**  
**DEFAULT DECLARATORY JUDGMENT**

**PLEASE TAKE NOTICE** that upon the Affidavit of Richard C. Agins, Esq. attorney for Plaintiff JAMES RUSSO and Third Party Defendant JAMES RUSSO a/k/a JAMES A. RUSSO, sworn to on the 6<sup>th</sup> day of March 2008, the undersigned will move this Court on the 8th day of April 2008 at 9:30 A.M. in Courtroom 11D of the United States Courthouse, 500 Pearl Street, New York, New York 10007, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure that the Default Declaratory Judgment dated February 4, 2008 and filed on February 6, 2008 (the "Default Declaratory Judgment") be confirmed and amended to set forth statements of fact that each of the referenced warrants and/or judgments had also been filed in the Office of the Secretary of State of the State of New York, which were inadvertently omitted from the Default Declaratory Judgment, but must be clarified, and granting the Plaintiff and Third Party Defendant such other further and different relief as is just, necessary and proper.

Dated: New York, New York  
March 6, 2008

Respectfully Submitted,

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and Third Party Defendant James. A. Russo*  
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TO:  
BY HAND  
HON. ANDREW CUOMO  
C/O MANAGING ATTORNEY'S OFFICE  
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK  
NEW YORK STATE DEPARTMENT OF LAW  
120 Broadway, 24th Floor  
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BY OVERNIGHT MAIL

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NEW YORK STATE DEPARTMENT OF LAW  
Suffolk Regional Office  
300 Motor Parkway  
Happauge, New York 11788

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

JAMES RUSSO,

Plaintiff,

- against -

MP222 LLC, 222 EAST 95<sup>th</sup> OWNERS CORP.,  
COMMISSIONER OF SOCIAL :  
SERVICES OF THE CITY OF NEW YORK, NEW  
YORK STATE DEPARTMENT OF TAXATION : 07 Civ. 5469 (WHP)  
AND FINANCE, NEW YORK CITY DEPARTMENT  
OF FINANCE, MERRILL LYNCH CREDIT :  
CORPORATION and the INTERNAL REVENUE :  
SERVICE OF THE UNITED STATES OF AMERICA, :

Defendants.

----- X

UNITED STATES OF AMERICA,

Counterclaim, Crossclaim  
and Third-Party Plaintiff,

- against -

JAMES RUSSO,

Counterclaim Defendant.

-and-

MP222 LLC, 222 EAST 95<sup>th</sup>  
OWNERS CORP., COMMISSIONER OF SOCIAL :  
SERVICES OF THE CITY OF NEW YORK, NEW  
YORK STATE DEPARTMENT OF TAXATION :  
AND FINANCE, NEW YORK CITY DEPARTMENT  
OF FINANCE, MERRILL LYNCH CREDIT :  
CORPORATION, :

Crossclaim Defendants,

and

JAMES A. RUSSO, JOHN DOES NOS. 1-10 and  
JANE DOES NOS. 1-10,

Third-Party Defendants.

-----X

**AFFIDAVIT IN SUPPORT OF**  
**MOTION TO CONFIRM AND AMEND**  
**DEFAULT DECLARATORY JUDGMENT**

STATE OF NEW YORK     )  
  ) ss.:  
COUNTY OF NEW YORK    )

RICHARD C. AGINS, being duly sworn, deposes and says:

1.       I am a member of the Bar of this Court and am a member of the firm of Agins, Siegel, Reiner & Bouklas, LLP, attorneys for Plaintiff JAMES RUSSO and Third Party Defendant JAMES RUSSO a/k/a JAMES A. RUSSO herein. I am familiar with the facts set forth herein.

2.       I submit this Affidavit pursuant to Rule 60 (a) of the Federal Rules of Civil Procedure in support of Plaintiff's application that the Default Declaratory Judgment, dated February 4, 2008 and filed on February 6, 2008 (the "Default Declaratory Judgment") be confirmed and amended to set forth certain statements of fact which were inadvertently omitted from the Default Declaratory Judgment, Said modifications are not substantive changes to the Default Declaratory Judgment, only confirming that the Judgments and Warrants referred to therein had also been filed in

the Office of the Secretary of State of the State of New York. A true copy of the Default Declaratory Judgment is attached hereto, made a part hereof and is marked as “Exhibit A.” A true copy of the proposed Amended Default Declaratory Judgment is attached hereto, made a part hereof and is marked as “Exhibit B.”

3. As previously set forth in the Affidavit submitted by me in support of the Default Declaratory Judgment, jurisdiction of the subject matter of this action and its removal to this Court from the Supreme Court of the State of New York, County of New York, is based on the naming of the Internal Revenue Service of the United States of America as a party Defendant herein.

4. Briefly, Plaintiff James Russo (the last four digits of Plaintiff’s Social Security Number are 7467) is an owner of four (4) cooperative apartment Units at 222 East 95<sup>th</sup> Street, New York, New York; and, has entered into a contract to sell those Units. A judgment and lien search, however, has revealed certain judgments and Tax Warrants filed by Defendant NYS against the son of the Plaintiff, named James A. Russo (the last four digits of his Social Security Number are 4259), who is not the Plaintiff in this action, but is named as a Third Party Defendant herein.

5. Pursuant to the Notice of Removal and the Notification of Removal to the United States District Court for the Southern District of New York, dated June 8, 2007, this case was removed in its entirety to this Court.

6. Service was made upon Defendant NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE (“NYS”), as follows:

a) A copy of the Summons and Complaint and Order to Show Cause was served



on Defendant NYS by personal service at its office at 400 Oak Street, Garden City, New York 11530 and proof of such service thereof was filed on or about June 5, 2007. A true copy of the Summons and Complaint is attached hereto, made a part hereof and is marked as "Exhibit C." A true copy of the Affidavit of Service is attached hereto, made a part hereof and is marked as "Exhibit D."

b) Not having heard from the Defendant, I made contact with Philip Matthews, Esq. of Defendant NYS and, sent him an additional copy of the entire Order to Show Cause, including the Summons and Complaint and the Notice of Removal by mail to him at his office at 80-20 Kew Gardens Road, Kew Gardens, New York, 11415 on October 3, 2007. I explained the situation to him and requested that Defendant NYS file a Notice of Appearance and then enter into the Stipulation of Settlement, as all of the other Defendants are intending to do. A true copy of the Letter to the Defendant, without attachments, is attached hereto, made a part hereof and is marked as "Exhibit E."

Mr. Matthews advised me that he turned the Order to Show Cause and all supporting documentation including the Summons and Complaint over to the "office of counsel" but, he had not heard from them. I spoke to Mr. Matthews on October 3, 2007, October 31, 2007, November 5, 2007 and November 7, 2007 and each time he advised me that he turned the papers over to the "office of counsel" but he had not received a response.

c) I was subsequently given the name of Alan Gitter, Esq., Assistant Attorney General of the State of New York, who was known to handle such matters. I called him

and he confirmed that he would be responsible to handle this matter, but that the Order to Show Cause with its attachments, including the Summons and Complaint, had not reached him.

I explained the situation and he requested that I put my request in writing and convey all the necessary documents to him. A copy of the Summons and Complaint and Order to Show Cause and the Notice of Removal was sent to the New York State Department of Law, Assistant Attorney General Alan Gitter at the Suffolk Regional Office of the New York State Department of Law at 300 Motor Parkway, Happpauge, New York on November 14, 2007. A true copy of the Letter to Assistant Attorney General Alan Gitter, without attachments, with proof of transmission by facsimile, is attached hereto, made a part hereof and is marked as "Exhibit F."

On November 19, 2004, I received a phone call from Assistant Attorney General Gitter in which he advised me that the State of New York had chosen not to appear in this action, and, would not enter into the Stipulation which was being negotiated by all other Defendants. I explained that my only choice was to enter a Default Declaratory Judgment, setting forth my client's rights. He stated to me that Defendant NYS would not oppose the entry of such a judgment.

d) On December 13, 2007, another copy of the Summons and Complaint was served. by hand on the Managing Attorney's Office, Office of the Attorney General of the State of New York, New York State Department of Law, 120 Broadway, 24th Floor, New York, New York 10271-0332. A true copy of the Affidavit of Service is attached hereto, made a part hereof and is marked as "Exhibit G."

7. In order to eliminate any chance of misunderstanding or confusion, on January 3, 2008, I sent a copy of the proposed Affidavit IN Support of Default Judgment, the proposed Clerk's Certification of Default and the proposed Default Declaratory Judgment to Assistant Attorney General Gitter and advised him that I would be filing them in ten (10) days from the date of my letter. There was no response, either oral or written from Assistant Attorney General Gitter within that period, or, for that matter, to date. A true copy of the Letter to Assistant Attorney General Gitter, without attachments, with proof of transmission by facsimile is attached hereto, made a part hereof and is marked as "Exhibit H."

8. Accordingly, Defendant NYS not having answered the Complaint, and the time to answer the Complaint having expired, it was requested that this Court enter the Default Declaratory Judgment, which it did.

NOW, upon motion of Richard C. Agins, Esq. for Agins, Siegel, Reiner & Bouklas, LLP, attorneys for Plaintiff and Third Party Defendant Russo:

IT IS RESPECTFULLY REQUESTED THAT AN AMENDED DEFAULT DECLARATORY JUDGMENT BE ISSUED AND FILED STATING THAT:

1. The Default Declaratory Judgment, dated February 4, 2008 and filed on February 6, 2008 is confirmed and amended, as follows:

a) NYS filed a Judgment in the Office of the New York Secretary of State in Albany and with [new material is underlined] the County Clerk of New York County, entered in Richmond County, docketed on July 20, 2006, effective April 19, 2004, in the amount of \$485,396.11 (Tax Warrant ID No. E-333907465-W001-2), against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action, the last four digits of Russo's Social Security Number being 7467. Therefore, said Judgment is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

b) NYS filed a Judgment in the Office of the New York Secretary of State in Albany and with the County Clerk of New York County, entered in Richmond County, docketed on July 20, 2006, effective April 19, 2004, in the amount of \$21,326.26 (Tax Warrant ID No. E-333907465-W002-6), against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said Judgment is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

c) NYS filed a New York State Tax Warrant (Tax Warrant ID No. E-333907465-W010-3) in the Office of the New York Secretary of State in Albany and with the County Clerk of New York County, docketed on September 7, 2005, effective as of August 29, 2005, in the amount of \$52,108.77, against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said New York State Tax Warrant is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

d) NYS filed a Judgment in the Office of the New York Secretary of State in Albany and with the County Clerk of New York County, entered in Richmond County docketed on July 20, 2006, effective October 25, 2004, in the amount of \$10,627.44 (Tax Warrant ID No. E-333907465-W004-5), against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said Judgment is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

e) NYS filed a Judgment in the Office of the New York Secretary of State in Albany and with the County Clerk of New York County, entered in Richmond County docketed on July 20, 2006, effective March 2, 2005, in the amount of \$64,230.15 (Tax Warrant ID No. E-333907465-W009-7), against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said Judgment is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

f) NYS filed a State Tax Warrant (Tax Warrant ID No. E-333907465-W029-8), in the Office of the New York State Department of State in Albany and also docketed and filed on June 26, 2007, in Queens County, in the amount of \$150.00 against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said State Tax Warrant is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

g) NYS filed a Judgment in the Office of the New York Secretary of State in Albany and with the County Clerk of New York County, entered in Richmond County docketed on July 20, 2006, effective January 6, 2006, in the amount of \$6,015.93 (Tax Warrant ID No. E-333907465-W011-7), against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said Judgment is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

h) NYS filed a State Tax Warrant (Tax Warrant ID No. E-333907465-W022-7), in the Office of the New York Secretary of State in Albany and also docketed and filed on November 14, 2007, in Richmond County, in the amount of \$63,686.69 against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said State Tax Warrant is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

I) NYS filed a State Tax Warrant (Tax Warrant ID No. E-333907465-W028-4), in the Office of the New York State Department of State in Albany and also docketed and filed on April 24, 2007 in Queens County, in the amount of \$29,755.74 against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said State Tax Warrant is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

j) NYS filed a Judgment in the Office of the New York Secretary of State in Albany and with the County Clerk of New York County, entered in Richmond County, docketed on July 20, 2006, effective October 25, 2004, in the amount of \$119,424.62, against a James Russo, with the last four digits of his Social Security Number being 4259, who is not the Russo in this action. The last four digits of Russo's Social Security Number being 7467. Therefore, said Judgment is not a lien on cooperative apartment Units herein: #1, 2, 3 or 4 at 222 East 95<sup>th</sup> Street, New York, New York.

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RICHARD C. AGINS

Sworn to before me this  
6th day of March 2008

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